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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The briefs of respondent and various supporting *amici* suffer from misconceptions about the language and the meaning of Section 504, particularly as applied to a clinical training program that directly involves the health and safety of those who are ill and hospitalized. They suffer, too, from a misinterpretation of the legislative intent with respect to the availability of private rights of action under Section 504.

1. The language of Section 504

Like the Fourth Circuit, respondent and most of the supporting *amici* ignore the first and basic approach to any problem of statutory interpretation: "The starting point in every case involving construction of a statute is the language itself." *Beal v. Doe*, 432 U.S. 438, 444 (1977), quoting from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). And "the language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

The language of Section 504 "in its context" is both clear and conclusive. In contrast to Sections 501 and 503, it says nothing about affirmative action programs; nor does it say anything about adjusting or modifying any physical qualifications deemed essential or appropriate to safe performance in any program or activity. Its rather lean terminology begins with a quick reference to the essential predicate to the entire provision – i.e., that the handicapped person must be "otherwise qualified." If he is not physically or mentally qualified to participate safely and effectively in the program in question, Section 504 does not come into operation. But if he is so qualified, Section 504 establishes a duty not to discriminate against, or exclude, the qualified handicapped person "solely by reason of his handicap."

It appears that physical qualification is not only a predicate requirement but is a concept quite different from the other Section 504 concepts of being handicapped and being excluded "solely by reason of his handicap." By referring only to those handicapped persons who are "otherwise qualified," Section 504 disavows any guaranteed admission to a clinical program for any and all handicapped persons

regardless of their physical disabilities. Nor does it command that any unqualified person be admitted simply because he is handicapped. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971).

In so making one's qualification the controlling predicate for invoking Section 504, Congress kept intact all the reasonable and non-discriminatory tests used by program administrators to determine who is qualified to participate safely in the program. In many purely academic programs, qualifications can be assessed without reference to any physical disability. And in some academic programs, special assistance and program modifications may be necessary to permit full participation by an "otherwise qualified" handicapped applicant.

But in some clinical programs, such as those in the medical and nursing areas, physical dexterity and functional use of all physical abilities and skills may be critically necessary to safe and effective participation. In that context, the existence of a physical handicap may be quite relevant to the assessment of the applicant's physical qualifications. If the handicap is so severe as to make likely a performance that is unsatisfactory and unsafe, the applicant can reasonably be deemed unqualified. Such a result, however, does not reflect the kind of handicap discrimination that concerns Section 504. Exclusion of an unqualified applicant, solely because his handicap renders him physically unqualified to participate, merely reflects a handicapped person's inability to meet the predicate requirement of Section 504 that he be "otherwise qualified."

In other words, as both the District Court and the H.E.W. have said, the "otherwise qualified" language in Section 504 denotes a handicapped individual who can meet all program-

related physical qualifications "in spite of" the handicap.[1] Any other interpretation produces the absurd result reached by the Fourth Circuit, whereby the handicapped person must be admitted to any kind of a program if he meets all qualification standards "without regard to" or "except for" the handicap.[2]

Many of the opposing briefs exhibit confusion about the effect that one's physical handicap may have upon one's qualification to participate in a physically-oriented clinical program. Thus respondent repeatedly asserts that the petitioner College, in finding the respondent unqualified to participate in the nursing program because of her severe hearing defect, acted "on the basis of false stereotypes" and created "an absolute bar against any hearing-impaired person being admitted to nursing school." Resp. Br. 10, 15. Such an assertion is not supported by any finding of the District Court or by any evidence in the record. Even as argument, such an assertion misconceives the nature of the physical qualifications appropriate to participation in a clinical nursing program. And the assertion further misses the effect that a physical handicap may have upon one's ability to meet such physical qualification standards.

The short of it is that consideration of a physical handicap in the clinical context is at least as relevant, if not more so, as consideration of one's academic record. A physical handicap is a physical fact of life, a fact which has a meaning and an impact even when divorced from any stereotyped or dis-

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[1] The District Court's statement to that effect appears at Pet.App. 20a. The H.E.W.'s statement to that effect appears in its analysis of its own §84.3(k) definition of the term "qualified handicapped person," 45 C.F.R. Part 84, Appendix A, p. 376.

[2] The Fourth Circuit's statement to that effect appears at Pet. App. 5a.

criminatory attitudes toward the handicapped. Unlike such matters as race, religion, national origin and sex, a physical disability dare not be disregarded in determining eligibility for the pursuit of certain physical endeavors.

This confusion as to the role of physical defects under Section 504 is further evident from the argument in the opposing briefs that handicapped persons are not to be excluded from participation in federally funded programs because of the recipient's refusal to make reasonable adjustments in its programs or to provide auxiliary aids to the handicapped applicant. But such adjustments and assistance, to the extent that they are required by Section 504, are designed solely (1) to ensure that the recipient's admission standards do not discriminate against the "otherwise qualified" handicapped person, and (2) to permit full participation in a program by such an "otherwise qualified" person. These forms of assistance to the handicapped are not directed at changing the physical qualifications reasonably required by a program; nor are they a means of changing one's physical status or one's capacity to meet physical qualifications related to safe performance in the program.

Indeed, the implementing regulations of the H.E.W. are entirely consistent with the maintenance of program-related physical qualifications. In the course of requiring that a recipient make modifications in its academic requirements to ensure that the requirements do not discriminate against a qualified handicapped applicant, 45 C.F.R. §84.44(a), the H.E.W. has provided:

> "Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section."

By the same token, clinical and physically-oriented program requirements that are essential to the program of clinical instruction or to a directly related licensing requirement – as is certainly true in the instant case – cannot be deemed discriminatory. More importantly, such clinical program requirements need not be modified or changed, even under the H.E.W. regulations, to meet the needs of the handicapped person who is *not* "otherwise qualified." Under §84.3(k)(3), a handicapped person is not considered "otherwise qualified" unless he can meet all "academic and technical standards requisite to admission or participation in the recipient's education program or activity."[3] It follows that program modifications need not be made to accommodate those who cannot meet such standards.

Some of the confusion in this case as between the concepts of physical qualification and being handicapped is generated by the somewhat ambivalent H.E.W. regulation, §84.42 (b)(4), that prohibits the program recipient from making a "preadmission inquiry as to whether an applicant for admission is a handicapped person," but permits the recipient, after admission, to "make inquiries on a confidential basis as to handicaps that may require accommodation."[4] The H.E.W.

[3] The H.E.W. has defined the term "technical standards" as referring to "all nonacademic admissions criteria that are essential to participation in the program in question." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 377. Physical criteria are obviously included within that definition, as are such factors as work experience, degree prerequisites and residency requirements. Respondent's effort to imply that only those latter three factors are included in the definition is baseless. See Resp. Br. 28.

[4] The H.E.W. considers that §84.42(b)(4) "generally prohibits preadmission inquiries as to whether an applicant has a handicap . . . [but] does, however, allow inquiries to be made, after admission, but before enrollment, as to handicaps that may require accommodation." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 388.

has stated that the considerations underlying that regulation are the same as those relative to the preemployment inquiry regulation, §84.14(a), which provides that a recipient, while forbidden to make preemployment inquiry as to whether the applicant is handicapped, or as to the nature of the handicap, can make "preemployment inquiry into an applicant's ability to perform job-related functions."[5] The latter inquiry would appear relevant to a determination of the handicapped person's physical qualifications, although it is difficult to see how an informed decision could be made in that respect without some kind of inquiry into the nature of the handicap.

These regulations provide no clear guideline as to how the program recipient is supposed to implement whatever reasonable and nondiscriminatory physical qualification standards may be requisite to safe performance. These regulations simply do not address that problem. Their sole concern is with the preadmission inquiries permissible in the essentially academic educational program, where the fact and the nature of the handicap have little or no relevance to the applicant's qualifications. And when the respondent and others try to apply those academic inquiry standards to those inquiries that are necessary in the execution of physical qualification requirements the resulting confusion is understandable, but not justifiable.

But not even the respondent suggests that Section 504 or the H.E.W. regulations really mean to preclude evaluation of "handicapped applicants on the basis of their qualifica-

[5] Using an example to explain §84.14(a), the H.E.W. has said that "an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 381.

tions." Resp. Br. 27. That being true, and since a given handicap may vitally affect one's ability to meet physical qualifications, it follows that it is not discriminatory or otherwise unlawful to inquire fully as to whether the applicant has a disability that would preclude safe and effective performance in the program.

That is what has happened in this case. The respondent had a severe hearing handicap, which she readily conceded and which was obvious to all. In a commendable attempt to test the extent of this disability and the effect it would have upon her ability to perform program-related physical activities, the College suggested that extensive audiological testing be made. After this highly personalized and nondiscriminatory inquiry the College concluded that the respondent was not physically qualified to perform the clinical portions of the nurse training program, wherein she would care for and keep in constant communication with those lying ill in hospitals. Far from acting on the basis of false stereotyped notions respecting all handicapped applicants, the College acted responsibly and in the best interests of the respondent, the untold number of patients that she might serve during the training program, and the North Carolina accrediting and licensing authorities that had delegated to the College the duty of determining and training only those who are fully qualified to perform all the physical tasks expected of professional RNs.

All of which is to say that the respondent totally failed to carry her burden of proving even a prima facie case of discrimination or exclusion solely by reason of her handicap. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973).

2. The overriding public concerns

The opposing briefs, like the Fourth Circuit, remain silent as to the overriding concern in this case – the public interst in having the safest possible nursing care for those who are ill or injured. And they are equally silent about the uncontested determination of the District Court that respondent's severe hearing handicap, even with the assistance of a hearing aid and the ability and need to lip read,

> ". . . actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations." Pet. App. 20a.

That "potential danger to patients," that inability to function properly and safely as a nurse trainee and as a professional RN, reflects the overriding public concern in this case. It emphasizes the absurdity of the Fourth Circuit's reading of Section 504, a reading that would require (1) that this severe handicap be ignored in assessing the respondent's qualifications, and (2) that she be admitted and trained in a program in which her handicap and inability to communicate fully would create a constant hazard and danger to hospitalized patients under her clinical care. And that threat to the safety and well being of those under her care exposes the futility and inapplicability of the "affirmative relief" suggested by the Fourth Circuit – the addition of more auxiliary hearing aids, the modifications of academic courses, and possibly the elimination of clinical courses or the use of one-on-one supervision for the unqualified nurse trainee.

This obvious public concern that the safest possible nursing care be provided the ill is a major reason why nurse trainees must be drawn from the national pool of those who are able-bodied in the fullest physical sense. To comply with that public concern, the nursing school degree, as well as the RN license, must be able to signify that the individual is prepared for entry into the nursing profession with the knowledge and the physical skills to function safely in a broad variety of clinical situations and to render a broad spectrum of patient care.[6] Most medical and nursing schools are not in the business of training seriously handicapped individuals who can perform only certain tasks without endangering the patients.

An informed idea of the physical skills essential to the development of safe nursing practices can be gleaned from the recent model guidelines, promulgated by the Association of American Medical Colleges, for use in the medical school admissions process. These guidelines were developed in response to the Section 504 nondiscrimination obligation, and appear in full in Appendix A of the *amicus* brief of that Association filed in this Court in this case. With only the modifications necessary to reflect the subordinate responsibility role of nurses, these medical school guidelines serve as a responsible and authoritative measure of the physical and clinical qualifications requisite for admission to a nurse training program.

Of particular relevance in those guidelines is the detailing of the five significant physical abilities and skills that qualify a candidate for the M.D. degree – and, for all practical purposes, for an Associate Degree in Nursing. See Appendix A of the Association's *amicus* brief, pp. 8a-11a. Those five va-

6 "It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses." *Board of Curators v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring).

rieties include (1) observation, encompassing the functional use of the sense of vision, somatic sensation, and smell; (2) communication, encompassing the ability to speak, to hear and to observe; (3) motor, encompassing the motor function of eliciting information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers; (4) intellectual-conceptual abilities; and (5) behavioral and social attributes. Of the most immediate concern in this case is the second or communication skill, which is described in the model guidelines as follows:

> "II. *Communication:* A candidate should be able to speak, to hear and to observe patients in order to elicit information, describe changes in mood, activity and posture, and perceive nonverbal communications. A candidate must be able to communicate effectively and sensitively with patients. Communication includes not only speech but reading and writing. The candidate must be able to communicate effectively and efficiently in oral and written form with all members of the health care team."

This, then, was the physical skill of communication that the respondent lacked. To possess that skill in the fullest degree, without substantial impairment, is one of the five critical physical qualifications for safe performance as a nurse member of a health care team. And it was the substantial impairment of this essential skill that convinced the District Court, after a full evidentiary hearing, that respondent could not safely perform in either her training program or her proposed RN profession. Nursing procedures performed by those not fully qualified in the above five physical senses pose constant and unforeseeable risks to the patients, to say nothing of posing potential legal risk for both the trainee nurse and those responsible for her train-

ing and supervision. See, generally, Murchison and Nichols, *Legal Foundations of Nursing Practice* 77-119 (1970); Challener, *The Rights, Liabilities and Duties of a Professional Nurse,* 54 Dick. L. Rev. 280 (1950).

The District Court's uncontested conclusion brings us back full circle to consideration of the public concern that safe nursing care be fostered and developed. Most certainly Section 504 should not be interpreted or applied in a manner that frustrates that public concern, particularly since Congress has given not the slightest indication that this concern should be ignored or challenged. Equally certain is the conclusion that the District Court, which was fully aware of this public concern, interpreted and applied Section 504 in a manner consistent with its language and its intent. In so doing, the District Court acted to protect and advance this overriding public concern. Its judgment should therefore be reinstated.

3. The confusion between clinical and academic programs

The confusion that seems to impregnate some of the language of Section 504 and some of the relevant H.E.W. regulations when applied to the facts of this case stems from one basic factor: Section 504 and the H.E.W. regulations are primarily if not exclusively structured to fit the problem of integrating the handicapped into the traditional academic educational programs. In those programs and activities, most handicaps have little if any relationship to qualifications and can constitute or generate no danger to the health or safety of others.

In other words, nothing in the statute or regulations seems designed to deal with the problems of the unqualified handicapped applicant who seeks admission to a federally funded program that deals directly with the health, the well being, the safety and even the life of those who are ill or injured. Congress did not deem it appropriate to focus here upon those problems in its formulation of the Section 504 principles. It obviously preferred to leave those problems, if they be problems, to the administrators of these public health type programs – the medical and the nursing programs – who are best equipped to understand and implement the public concern that only the most qualified be allowed to treat the sick and the infirm.

Indeed, Congress has consistently refrained from attempting to interfere with the administration and the curricula of federally funded programs and activities, like nurse training programs, that deal directly with the public health and with the training of those who serve and care for the ill. Thus in the Nurse Training Act of 1964, 78 Stat. 912, Congress took affirmative steps to encourage the flow of the able-bodied into the fields of nursing education and to improve and maintain the "high level of training demanded of the professional nurse."[7] It did so by providing for nursing school construction and project grants and for nursing student loan programs, hoping thereby to enable the schools to attract and train more qualified students to fill the critical national shortages in professional nursing personnel. And it did so on the express condition that, in executing this program, no department, agency or officer of the United States be authorized

[7] S. Rep. No. 1378, 88th Cong., 2d Sess. (1964), reprinted in [1964] U.S.Code Cong. & Admin. News 3669, 3672. That report also stated that the future supply of "trained nurses that will be needed if national health needs are to be met" must be drawn "from a much larger reservoir of able young women and men regardless of financial condition." *Ibid.*, 3673.

> ". . . to exercise any direction, supervision, or control over, or impose any requirement or condition with respect to, the personnel, curriculum, methods of instruction, or administration of any [nursing] institution." 42 U.S.C. §298a.

It would seem inconsistent with the spirit and the letter of the Nurse Training Act to so interpret or apply the provisions of Section 504 as to condition or alter the personnel, curriculum or methods of instruction in federally funded nursing schools in order to accommodate the needs and limited qualifications of the severely handicapped.

On the other hand, Congress is concerned about providing special educational opportunities at the postsecondary level for the deaf and other severely handicapped persons. But that concern is expressed outside the boundaries of the usual educational and training programs. Thus in the Education Amendments of 1974, 88 Stat. 584, 20 U.S.C. §1424a, Congress authorized a program of grants and contracts with institutions of higher education, junior and community colleges, and vocational and technical institutions

> ". . . for the development and operation of specially designed or modified programs of vocational, technical, postsecondary, or adult education for deaf or other handicapped persons. . . [who] by reason thereof require special education programming and related services."

Here again is an expression of a continuing concern by Congress that the regular vocational and clinical training programs for those who are truly qualified not be altered or modified to accommodate the severely handicapped students who need specially designed programming. And it would appear inconsistent with that legislative policy to interpret and apply

Section 504 so as to provide such special programming for the severely handicapped by means of the "affirmative accommodation" concept developed under Section 504.

In short, Congress simply has not used Section 504 as a means of addressing the unique problems of accommodating the postsecondary and clinical training programs to the educational needs of the severely handicapped. All that Section 504 was meant to accomplish was to open and to accommodate the academic-type postsecondary programs to the needs of those who are both handicapped and qualified. The confusion and difficulty come when an effort is made, as in this case, to superimpose the language of Section 504, and its implementing regulations, upon a specialized problem that Section 504 was not designed to handle. The initial problem of reading the words "otherwise qualified," for example, is created by the simple fact that Section 504 is being applied out of its narrow context of the qualified handicapped person making an application to an academic-type program where the handicap itself plays virtually no role in the assessment of qualifications. The very absurdity of the result reached by the Fourth Circuit in this case is proof that Section 504 does not literally apply under the facts of this case.

Given the inapplicability of Section 504 to this kind of postsecondary clinical training program, with all its public health implications, the result reached by the District Court is the only sensible one possible. Any other result would have frightening consequences to those highly skilled training programs that the public relies upon to supply the most able and safe medical and nursing care. Congress has given no indication that Section 504 is singularly designed to accomplish what various other Congressional statutes have studiously avoided – i.e., lower the physical qualification

standards of the nation's medical and nursing schools so as to provide some sort of modified training that can only produce and foster unsafe medical and nursing care. Something more than the ambiguities of Section 504 would be necessary before assuming that Congress intended to revolutionize and downgrade the quality of the nation's health care.

4. Private right of action under Section 504

Little need be added to the discussion already before this Court as to whether a private right of action may be implied from Section 504's silence on the matter. The 1978 Amendments to the Rehabilitation Act, which created the new Section 505, expressly recognized that a private suit can be brought under Section 504 only where the primary objective of funding the particular program or activity is to provide employment. See *Trageser v. Libbie Rehabilitation Center,* 590 F.2d 87 (4th Cir. 1978), petition for certiorari pending, No. 78-1454.

That being true, there no longer is any need to speculate as to whether any other kinds of private actions may be implied under Section 504. The careful delineation in Section 505 of the limited kinds of actions that may be brought removes any doubt that Congress did not and does not intend to authorize a private suit in a non-employment situation, as is here present. Pet. Br. 60-63.

Any suggestion that resolution of this private right of action problem may be avoided, by virtue of the fact that respondent grounded her suit in part on 42 U.S.C. §1983, is misplaced. There is some confusing language in the latter part of the District Court's opinion (Pet. App. 19a) that indicates that respondent "contends" that by violating Section

504, the College "has denied her rights guaranteed under the 'law of the United States,' thus giving rise to a cause of action under 42 U.S.C. §1983." But the procedural and jurisdictional history of this case contradicts that statement, and demonstrates that respondent never grounded her §1983 claim on an alleged violation of Section 504.

A more accurate accounting of the §1983 claim is contained in the opening paragraph of the District Court's opinion. Pet. App. 12a. That accounting shows that there were two quite separate jurisdictional bases for respondent's cause of action:

1. The allegation under §1983 that the College had denied respondent her constitutional rights to equal protection and due process by denying her admission to its nursing program. See also paragraph 13 of the complaint, App. 5a, and the pre-trial order dealing with respondent's jurisdictional contentions, App. 15a.

2. The separate allegation under Section 504 that the respondent was discriminated against by the College in denying her admission "because of a hearing disability." See also the pre-trial order, App. 15a.

The opinion of the Fourth Circuit correctly summarizes these two separate jurisdictional allegations. Pet. App. 3a. And that opinion further observes, correctly, that the §1983 claim of a constitutional violation was dismissed by the District Court, and was one of the issues raised on respondent's appeal. Pet. App. 3a. But since the Fourth Circuit disposed of the appeal on the basis of the non-constitutional claim under Section 504, it became unnecessary to dispose of the §1983 constitutional claim. Pet. App. 5a, fn. 4.

Thus the §1983 claim was at all times grounded solely on an alleged violation of the Fourteenth Amendment, not

upon an alleged violation of a law of the United States, i.e., Section 504. The Section 504 claim was at all times kept separate from the §1983 claim, and became the sole jurisdictional footing of the issues resolved by the Fourth Circuit. The question as to the viability of such a statutory claim remains before this Court.

It accordingly becomes unnecessary to address the jurisdictional enigma that might have ensued had the §1983 claim been based upon an alleged violation of Section 504. It is far from clear that a §1983 claim of a statutory violation can create a cause of action where the statute that has allegedly been violated itself creates no cause of action, or at least is silent on the matter.

CONCLUSION

The foregoing discussion augments petitioner's claim that the District Court's judgment should be reinstated.

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